IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

vs.

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below.

The opinion of the Court of Appeals is reported at 191 F. 2d 201. The first opinion of the District Court is reported at 92 F. Supp. 551; its opinion on rehearing (not reported) appears at pages 58-62 of the record.

Jurisdiction.

Petitioner has invoked the jurisdiction of this Court under § 1254, subdivision 1 of the Judicial Code.

Statement of the Case.

Petitioner seeks to review a judgment of the Court of Appeals for the Second Circuit rendered August 13, 1951, which affirmed a judgment of the District Court rendered December 8, 1950 in the total amount, with interest and costs, of $10,434.74. A jury had rendered a general verdict for $6,000, and had also answered interrogatories [63-4]* as follows:

> "First Interrogatory: Did defendant receive money from Milton I. Milvy with knowledge that such money was being paid to him as part of the proceeds of the settlement of the stockholder's derivative action in the New York Supreme Court entitled Russell, et al v. Hopson, et al?
>
> "Answer: Yes.
>
> "Second Interrogatory: If so, how much did defendant receive?
>
> "Answer: $6,000.
>
> "Third Interrogatory: State when such sum or sums were so received by defendant.
>
> "Answer:
>
> | | |
> |---|---|
> | August 18, 1938 ..... | $ 500.00 |
> | September 13, 1938 ..... | 1,000.00 |
> | October 18, 1938 ..... | 3,000.00 |
> | November 9, 1938 ..... | 1,500.00 |
>
> "Fourth Interrogatory: Did plaintiff or a predecessor trustee of Associated Gas and Electric Company have knowledge, prior to June 17, 1947, of such receipt of moneys by defendant?
>
> "Answer: No.
>
> "Fifth Interrogatory: Could plaintiff or any predecessor trustee of Associated Gas and Electric Company with due diligence have obtained such knowledge prior to June 17, 1947?
>
> "Answer: No."

Defendant Samuel M. Levy, an accountant, and Milton I. Milvy, a lawyer, were brothers, the latter having changed

---

* References unless otherwise specified are to pages of the record.

his name [68]. On April 27, 1936 [47-8], they entered into a joint venture for the prosecution of stockholders' derivative actions on behalf of eleven large corporations, Milvy to do the legal work and defendant the accounting. The gross fees were to be divided, one-third to defendant and two-thirds to Milvy. On July 7, 1938, in a suit brought on behalf of two stockholders of Associated Gas and Electric Company (Ageco) in a New York State Court, they succeeded in effecting a private settlement with the defendants in that action and Milvy received $21,000 [4, 5, 8], surrendering stock worth $204.88. Actually, the money came from a wholly owned subsidiary of Ageco [13]. Milvy paid his own disbursements [2-3], gave less than $1,000 to the stockholder clients [5, 7], and retained the balance for defendant and himself.

Although there was evidence that Milvy was suspicious that the settlement money might be coming from the corporation itself and not from the defendant-directors [17-18], there was no proof that either he or defendant knew the actual source. The jury found, however, that when defendant received $6,000 he knew that that amount came from the proceeds of settlement of the action ostensibly brought on behalf of the corporation [63]. In view of defendant's arrangement with Milvy, he must have known that the corporation was receiving nothing.

A petition for the reorganization of Ageco was filed January 10, 1940 [2]. Plaintiff is successor trustee. The jury has found that neither plaintiff nor his predecessors had knowledge prior to June 17, 1947, of defendant's receipt of a part of the proceeds of the private settlement. It has further found that neither plaintiff nor any predecessor trustee could with due diligence have obtained such knowledge prior to that date [63-4]. Suit was commenced June 28, 1948 [1].

POINT I.

The decision that recovery was not barred by a statute of limitations is not in conflict with a decision of this Court.

A. Under the rule of *Bailey* v. *Glover*, the action was commenced in time.

§ 11 of the Bankruptcy Act (11 U. S. C., § 29), so far as material, reads as follows:

> "e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the federal or state law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by federal or state law had not expired at the time of the filing of the petition in bankruptcy."

The "adjudication" in the case of a Chapter X proceeding is the date of the approval of the petition (Bankruptcy Act, § 102, 11 U. S. C., § 502). The petition for the reorganization of Ageco was filed and approved January 10, 1940 [2, 8].

Defendant received his share of the proceeds of the private settlement, in which his joint venture with Milvy had resulted, in several payments, the first of which was on August 18, 1938, and the last on November 9, 1938 [63].

The New York Court of Appeals has held an action of this character to be one for money had and received. *Clarke* v. *Mayer* (1946) 295 N. Y. 830. Such a claim, sounding in contract, is not barred under state law until six years after its accrual. New York Civil Practice Act, § 48, subdivision 1. The period of limitation fixed by state law thus not having expired at the time of the filing of the petition in bankruptcy on January 10, 1940, the federal statute came into play.

The running of the federal statute, however, was under federal law suspended by the rule of *Bailey* v. *Glover* (1874) 21 Wall. 342, in the contemplation of which it was enacted and by which it must be construed. That rule is that where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him, and that that is so although the party committing the fraud has made no special effort to conceal it.

The jury found that neither plaintiff nor his predecessors had knowledge prior to June 17, 1947, of defendant's receipt of his share of the proceeds of the private settlement and could not with due diligence have obtained such knowledge prior to that date [63-4].

If, therefore, the rule of *Bailey* v. *Glover* is applicable, the two-year federal statute did not commence to run until June 17, 1947, and the claim was not barred when, on June 28, 1948, the complaint was filed [1].

Bailey v. *Glover* was, as here, a suit by an assignee in bankruptcy, and the statute of limitations in question was the two-year statute, the predecessor in the Bankruptcy Act of 1867 of the present statute of limitations.

The suit was in equity to set aside as fraudulent a transfer by the bankrupt. It was held error to dismiss the bill upon the ground that the statutory period had expired. The Court said, per MILLER, J. (p. 348):

> "We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered,

> though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

The Court then pointed out that under the 1867 statute "no suit at law or in equity" could be brought after the expiration of the statutory period, and said (p. 349):

> "It is quite clear that this statute must be held to apply equally by its own force to courts of equity and to courts of law, and if there be an exception to the universality of its language it must be one which applies under the same state of facts to suits at law as well as to suits in equity.
>
> "But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity."

Fraud, of course, is a word capable of very broad meaning. As stated in *Connolly* v. *Gishwiller* (7 C. A. 1947) 162 F. 2d 428, cert. denied 332 U. S. 825 (p. 433):

> "Fraud, in its general sense, comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another."

"Fraud", as used in *Bailey* v. *Glover,* is obviously used in a broad and generic sense and not in the narrower sense of deceit. *Bailey* v. *Glover* was a case of a fraudulent transfer by a bankrupt. In order for it to be a "fraudulent conveyance" it is not necessary that the bankrupt conceal from his creditors what he is doing.

Bailey v. *Glover* exactly fits the present case. As the Court of Appeals noted in the instant case [91]:

> "Each action was by an assignee, or trustee, in bankruptcy; each was assumed to be barred under the state law; each was to recover money which had belonged to the bankrupt and which the defendant

had converted; in each the defendant had done nothing to cover up his guilt; in each the assignee, or trustee, had failed to discover the transfer within the period of limitation; and in each there had been no lack of diligence on his part in failing to do so."

The point which petitioner makes (Brief, p. 11) that what was transferred in the *Bailey* case was real estate while here it is money, is manifestly a distinction without a difference.

The Court below, therefore, did nothing but follow a close and controlling precedent.

B. *Bailey* v. *Glover* was not overruled or modified by *Avery* v. *Cleary*.

Petitioner's contention that the decision below is in conflict with a decision of this Court is apparently based upon the theory that *Bailey* v. *Glover* was modified by *Avery* v. *Cleary* (1890) 132 U. S. 604. Under the doctrine of that case, he argues, the running of the statute is not suspended if there be no efforts on the part of defendant to conceal the cause of action from the knowledge of the other party.

Avery v. *Cleary* was also a suit by a bankruptcy assignee to set aside a fraudulent transfer. But it cannot be made to stand for petitioner's proposition. In the first place, the assignee's predecessor in that case had had knowledge of the existence of the transfer for an entire two-year period and had done nothing about it. That in itself was sufficient for the decision of the case. In the second place, the Court's language upon which petitioner leans was not spoken of a participant in the fraud, but of minor children, who knew only that they had received the proceeds of their father's (the bankrupt's) life insurance policies.

Moreover, subsequent decisions of this Court have made it clear that *Bailey* v. *Glover* remains unimpaired and is

still the law. In *Exploration Co.* v. *United States* (1918) 247 U. S. 435, this Court said, per DAY, J. (p. 448):

> "*Bailey* v. *Glover* has never been overruled nor modified in this court and has been approved and followed."

The Court cited several decisions in support of that statement and among them, *Avery* v. *Cleary.*

This Court as recently as 1946, in *Holmberg* v. *Armbrecht,* 327 U. S. 392, again attested the allegiance of this Court to the *Bailey* doctrine, saying, per FRANKFURTER, J. (p. 397):

> "And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' *Bailey* v. *Glover,* 21 Wall. 342, 348; and see *Exploration Co.* v. *United States,* 247 U. S. 435; *Sherwood* v. *Sutton,* 5 Mason 143.
>
> "This equitable doctrine is read into every federal statute of limitation."

In view of this recent approval of the *Bailey* doctrine, not partially but in its entirety, the contention that *Avery* v. *Cleary* has established a different doctrine and that the Court below did wrong to follow *Bailey* v. *Glover* is clearly not well taken.

C. Since *Bailey* v. *Glover* has not been overruled or modified, the question whether it was correctly applied to the particular facts is not one for certiorari.

At one point (Brief, p. 16) petitioner disavows the contention that *Avery* v. *Cleary* overruled *Bailey* v. *Glover.*

If this concession be accepted, the only question presented by the petition is whether the Court correctly applied *Bailey* v. *Glover;* i.e., whether under the particular facts of this case petitioner is to be classified as a participant in a fraudulent transaction, or as an innocent of like status with the minor children in *Avery* v. *Cleary.*

But petitioner's contention that he was not in fact guilty of fraud clearly does not present a question for determination by this Court. The courts below had ample support for their view.

The proceeds of the settlement of the stockholder derivative action, whether they come from the corporate till or from the individual defendants, belong to the corporation. The stockholder plaintiff is a fiduciary for moneys received in settlement of the action. *Clarke* v. *Greenberg* (1947) 296 N. Y. 146; *Certain-Teed Products Corporation* v. *Topping* (2 C. A. 1948) 171 F. 2d 241.

Petitioner's entire brief proceeds on the erroneous assumption that participation in a breach of fiduciary duty is not fraud in the broader sense in which that word is used in *Bailey* v. *Glover.* In New York, it is the law that the breach of a fiduciary duty is fraud. *Emmerich* v. *City Bank Farmers Trust Co.* (1950) 300 N. Y. 417.

Petitioner relies heavily on the proposition that, prior to the decision of the Court of Appeals in *Clarke* v. *Greenberg* (1947) 296 N. Y. 146, a segment of the bar, and even certain of the inferior courts in New York, appeared to be of opinion that if a stockholder derivative action was settled before judgment, the stockholder, his lawyer and accountant might appropriate the proceeds and give nothing to the corporation whose rights they had purported to champion. This proposition was so monstrous, however, that it was bound to meet authoritative judicial condemnation. The decision of the New York Court of Appeals in *Clarke* v. *Greenberg* had been foreshadowed by the decision of this Court in *Young* v. *Higbee Co.* (1944) 324 U. S. 204.

The private settlement in this case, while typical, exhibits in its detail the essentially fraudulent character of the transaction. Milvy knew that other suits had been brought [69, 70]. There was no need for this one. The complaint was not the result of additional research, either on the part of Milvy or of defendant. Milvy simply copied the complaint in a previous action [70, 74]. Defendant's "services" (which, incidentally, he denied having rendered) consisted, not in analyzing corporate records or statements, but in analyzing the complaints in previous stockholder actions [70]. The very day the suit was started Milvy and defendant entered into a new agreement for division of the spoils [82]. Practically simultaneously with the commencement of the suit Milvy was in settlement negotiations [72]. Those negotiations were with the attorneys for the corporation whose interest the co-adventurers had purported to champion [70, 72]. The settlement took the form of the sale for $21,000 of Ageco stock worth $204.88. The stockholders who had loaned their names to the enterprise received relatively insignificant portions of the settlement money; the balance, less Milvy's disbursements, was divided between Milvy and Levy in accordance with the terms of their agreement.

The corporation, which was to be benefited, actually suffered to the extent of the settlement moneys paid its professed champions. Whether Milvy and defendant knew the actual source or not, the manner of the prosecution and settlement of this suit was clearly such as to indicate that the parties at no time had an intention of actually securing redress for the wrongs which the corporation had suffered.

What the co-adventurers sought and received was hush money. Implicit in the settlement, if not expressed, was the agreement to keep quiet about the wrongs which the corporation had suffered and which had been the subject

of their complaint. There would be no point in paying so excessive a price for the stock unless that were understood.

Hence this situation fits exactly into the ruling of *Bailey* v. *Glover,* which halts the running of the statute until discovery "when the fraud has been concealed, or is of such character as to conceal itself." Indeed, the private settlement of the stockholder action precisely fits the description of a fraud "of such character as to conceal itself." It was because these settlements were of such character as to conceal themselves that Federal Rule of Civil Procedure 23 required notice to stockholders and approval of the Court as a condition precedent to a dismissal or compromise of the action.

POINT II.

No conflict exists between decisions of the Courts of Appeal either within or without the Second Circuit upon the question of the suspension of a federal statute of limitations by concealment of the fraud.

No decision of a court of appeals has departed from, or attempted to place any refinement upon the doctrine of *Bailey* v. *Glover.* None of the cases cited by petitioner related to a federal statute of limitations.

Arkansas Natural Gas Co. v. *Sartor* (5 C. A. 1935) 78 F. 2d 924, dealt solely with the application of a Louisiana statute of limitations. This decision upon purely state law presents no conflict with the decision below. Furthermore, the Court in that case held that plaintiffs with reasonable diligence could have ascertained their rights.

Michelsen v. *Penney* (2 C. A. 1943) 135 F. 2d 409, 415, dealt exclusively with the New York statute of limitations. The Court pointed out that in New York the rule that the cause accrues only upon discovery of the facts is not ordinarily applied. The Court said, per CLARK, *J.* (p. 415):

"But the statute is tolled while a corporate plaintiff continues under the domination of the wrongdoers."

It is true that knowledge of the transactions there reviewed was imputed to the national bank receiver from the date of his appointment. The case, however, did not involve fraud, and all of the transactions which were held unlawful, or as to which the bank directors were held negligent, were ascertainable from the books and records of the bank in the receiver's possession.

Laird v. *United Shipyards, Inc.* (2 C. A. 1947) 163 F. 2d 12, also dealt exclusively with the New York statute. The Court said in that case (p. 15):

> "It has been proved and found that at the time such alleged breaches of duty occurred all parties then having any interest in, or holding any position of responsibility to, the corporation were fully aware of all the facts."

There was no such proof in this case.

In re Italian Cook Oil Corporation (3 C. A. 1951) 190 F. 2d 994, holds that a reorganization trustee who elects to complete a contract is bound by an assignment of the moneys to become due under the contract which the debtor made before the petition was filed. It is not a statute of limitations case, and there was no claim of fraud.

POINT III.

This Court will not review the determination of the Court of Appeals that interest was properly added, since that is exclusively a question of state law.

"The question [of interest] is always one of local law." *Holden* v. *Trust Company* (1879) 100 U. S. 72, 74.

This is true when the case is one of diversity of citizenship. *Ohio* v. *Frank* (1880) 103 U. S. 697; *Massachusetts*

Benefit Association v. *Miles* (1891) 137 U. S. 689, 691; *Klaxon Co.* v. *Stentor Co.* (1941) 313 U. S. 487, 497. It is also true when the case is one arising under the Constitution and laws. *Louisiana & Arkansas Ry. Co.* v. *Pratt* (5 C. A. 1944) 142 F. 2d 847; *Rigopoulos* v. *Kervan* (S. D. N. Y. 1943, LEIBELL, J.) 53 F. Supp. 829, 830.

Since the question whether interest was properly awarded from the time of defendant's receipt of the moneys is a question of New York law, involving an interpretation of § 480 of the Civil Practice Act of that state, and of state decisions both before and subsequent to its adoption, this Court will accept the determination of that law by the Court of Appeals for the Second Circuit. In *Huddleston* v. *Dwyer* (1944) 322 U. S. 232, 237, this Court said:

> "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. *Ruhlin* v. *New York Life Ins. Co., supra* [304 U. S. 202]."

Conclusion.

The decision below is not in conflict with any decision of this Court, nor with any decision of a court of appeals in the Second Circuit or elsewhere. On the contrary, the question of the statute of limitations was correctly resolved under the doctrine of *Bailey* v. *Glover,* to which this Court has steadfastly adhered.

The question whether the correct amount of interest was added is one of state law in which this Court, in the absence of extraordinary circumstances not shown here, accepts the decision of the intermediate appellate court.

The petition for a writ of certiorari should be denied.

Dated, New York, N. Y., November 12, 1951.

Respectfully submitted,

HAROLD HARPER,
Counsel for Respondent.

Office-Supreme Court,
FILED
DEC 7 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, etc.,

Respondent.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT MONTE LEVY,
Attorney for Petitioner,
170 Fifth Avenue,
New York 10, N. Y.

Dated: New York, N. Y., December 6, 1951.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033